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CORD
AND
RIEFS

IN THE SUPREME COURT OF THE UNITED STATES

ERICK DANIEL DAVILA,
Petitioner,

-v-

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER DAVILA

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ARGUMENT

I. THE DIRECTOR'S RESPONSE IS WRITTEN IN THE PARADIGM OF THE REGIONAL COURT OF APPEALS, RATHER THAN THE SUPREME COURT

The Director states:

> Since Davila encourages the Court to extend *Martinez* to IAAC claims, by definition he cannot show that reasonable jurists would debate the correctness of the district court's procedural default determination based on ***this Court's*** then-existing precedent.

State's Br. at 13 (emphasis added).

> Davila cites to a Ninth Circuit opinion that has read *Martinez* as applying to IAAC claims, but the reasoning of that opinion has not been adopted by the ***Fifth Circuit.***

Id. (emphasis added).

Davila can only respond, 'agreed' and responds that these contentions suffer the logical fallacy of infinite regress. In other words, no petitioner could ever argue that this Court should grant cert on a Circuit-split, because by definition that case arose from a Circuit on the 'wrong side' (at least from the perspective of the petitioner) of the split.

The Director also confuses the role of a petition for certiorari, as contra-distinguished from a merits brief:

> Although Davila petitions this Court for review of the Fifth Circuit's denial of COA, he does not argue the purported ***merits*** of his underlying IAAC claim.

State's Br. at 9 (emphasis added).

Simply put, Davila's case is at the cert petition, rather than merits review, stage. "When the Court grants certiorari—which is as common as winning the lottery—the parties file briefs on the ***merits*** of the case and, typically, the Court will hear oral argument and then issue a decision in the case." Elizabeth Slattery, *Supreme Court 101: A Primer for Non-Lawyers* (available at: http://www.heritage.org/research/reports/2014/04/supreme-court-101-a-primer-for-non-lawyers).

II. THE DIRECTOR'S 'WAIVER' ARGUMENTS ARE INAPPOSITE

The Director is incorrect in her assertion that "he does not argue the purported merits of his underlying IAAC claim." State's Br. at 9. As best as Davila can tell, the Director means to argue that his arguments about *Martinez/Trevino* extending to excuse procedural default on the part of state direct appellate counsel are pretermitted by an absence of any underlying error for that appellate attorney to have argued against. At the same time, the Director appears to raise a related argument that

Davila has inadequately briefed his argument for review in this Court. State's Br. at 9-10 (citing a passel of Fifth Circuit cases on waiver, none of which have to do with the quantum of argument required to raise a claim for cert petition in the Supreme Court).

The Director's two interrelated arguments fail, in no small part because Davila raised this issue extensively through such arguments as: "The jury seized on the 'single intent' argument, but was given an improper jury charge virtually ensuring a capital murder conviction." Davila's Br. at 9; "The judge responded with a misleading instruction, which did not clarify that Davila must have intended to kill two distinct people before he could be convicted of capital murder." Davila's Br. at 10; "The defense objected to giving the jury this charge, but the objection was overruled." *Id.*; "Davila's direct appellate counsel failed to raise this incorrect jury charge argument on direct appeal."; *Id.*; "Had Davila's appellate counsel raised the charge error claim on direct appeal his conviction would have been reversed." *Id.*

III. The Director's Argument Concerning Davila's Purported Forfeiture of the Jury-Charge Argument Suffers a Misunderstanding of the Standard of Review of These Claims Under Texas Law

The Director is mistaken in its contention:

> [T]he allegedly erroneous jury instruction that serves as the basis for Davila's claim of appellate-counsel ineffectiveness was not properly preserved for review with a trial objection.

State's Br. at 14.

However, Texas law does not completely bar review of a jury instructional error if a trial objection is not made:

> Under *Almanza*, the degree of harm required for reversal depends on whether the error was preserved in the trial court. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005); *Almanza*, 686 S.W.2d at 171. Where, as here, the defendant did not raise a timely objection to the jury instructions, reversal is required only if the error was fundamental in the sense that it was so egregious and created such harm that the defendant was deprived of a fair and impartial trial.

Villarreal v. State, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015).

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE TEXAS COURT OF CRIMINAL APPEALS AND THE FIFTH CIRCUIT HAVE BOTH HELD, REPEATEDLY, THAT NO BURDEN OF PROOF IS REQUIRED ON TEXAS' MITIGATION SPECIAL ISSUE IN SPITE OF THE FACT THAT A SPECIFIC FINDING ON THAT SPECIAL ISSUE IS A PREREQUISITE TO A SENTENCE OF DEATH. THESE DUAL HOLDINGS CONFLICT WITH THIS COURT'S DECISION IN *APPRENDI*, *RING*, AND *HURST*.

Kansas v. Carr, 136 S. Ct. 633 (2016) does not support the contention that no burden of proof is required when "a Texas capital-

sentencing jury must specifically answer the mitigation special issue in the negative to render a death sentence,". *See* Davis Br. at 27-30.

Davila challenges Texas' sentencing scheme under the Due Process Clause of the Fifth and Fourteenth Amendments, and the Sixth Amendment's notice and trial guarantees. *Carr* involved a completely separate issue: whether the "the Eighth Amendment requires capital-sentencing courts in Kansas 'to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt.'" *Carr*, 136 S. Ct. at 642. Not only are the constitutional bases of these two claims different, but Davila is not asking for an instruction relating to the existence of individual mitigation factors. He is asking that the jury be required to make all findings necessary for a death sentence beyond a reasonable doubt.

Nor is this Court's concern in *Carr*, related to assigning a burden of proof to mitigation evidence, relevant to Texas' capital sentencing scheme. *Carr*, 136 S. Ct. at 642. In *Carr*, this Court recognized that it was possible to assign a burden of proof to the aggravating factors in Kansas' capital scheme because they were "a purely factual determination." *Id.* However, whether or not mitigation exists is "largely

a judgment call" which would, according to the Court, not lend itself to a burden of proof.

However, Texas' first statutory special issue (also a necessary ingredient for a sentence of death) asks the jury to make a judgment call, and it successfully employs a burden of proof: "Do you find beyond a reasonable doubt that there is a probability that the defendant, Erick Davila, would commit criminal acts of violence that would constitute a continuing threat to society?" TEX. C. CRIM. P. ART. 37.071(e)(1). This question, clearly a judgment call, lends itself nicely to the beyond a reasonable doubt standard required by *Ring, Apprendi,* and *Hurst.*

Texas could just as easily require a burden of proof on the second special by instructing the jury as follows: "Do you find **[beyond a reasonable doubt]**, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Erick Davila, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentenced be imposed?" Art. 37.071(e)(1) **(suggested language in bold)**.

Indeed, Davila is merely asking for a jury instruction similar to the one given in *Carr* which made "clear that both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt." *Carr*, 136 S. Ct. at 643. The defect in Texas' capital sentencing scheme is that the jury is not required to conclude that the mitigating evidence does not outweigh the aggravating evidence beyond a reasonable doubt. *Carr* does not affect the analysis of this claim.

Further, this claim is not *Teague* barred. The non-retroactivity doctrine established in *Teague v. Lane*, 489 U.S. 288 (1989) prohibits the retroactive application of new constitutional rules of criminal procedure on collateral review. Under *Teague*, a new rule is one which either breaks new ground, imposes a new obligation on the states or the federal government, or was not dictated by precedent existing at the time the defendant's conviction became final. *See Graham v. Collins*, 506 U.S. 461, 467, (1993).[1] "Under this functional view of what constitutes a new rule,

[1] There are two exceptions to the non-retroactivity principle announced in *Teague:* (1) where the new rule of criminal procedure places certain kinds of conduct beyond the power of the government to proscribe; or (2) if the rule requires the observance of procedures that are implicit in the concept of ordered liberty. *Teague*, 489 U.S. at 307 (citations omitted).

our task is to determine whether a state court considering [Davila's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [Davila] seeks was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

Davila's case became final when this Court denied certiorari of his direct appeal on January 26, 2011. *Davila v. State*, No. AP-76,105, 2011 Tex. Crim. App. Unpub. LEXIS 43 (Tex. Crim. App. 2011).

At that time both *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) had been decided. Davila's argument involves mere interpretation and application of well-settled concepts *as supported* by *Hurst*. Accordingly, the anti-retroactivity principles of *Teague* have not been violated.

CONCLUSION

This Court should grant the petition and order merits review.

Respectfully submitted this 7th day of December 2016.



By: _____
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Appointed CJA Counsel of
Record for Petitioner

CERTIFICATE OF MAILING

I hereby certify that, on the 5th day of December 2016, this pleading was served on the Court via mail courier.



Seth Kretzer

CERTIFICATE OF SERVICE

I hereby certify that, on the 5th day of December 2016, a true and correct copy of this petition and appendices was sent to AAG Katherine Hayes in the Office of the Texas Attorney General.



Seth Kretzer